IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU
(Appellate Jurisdiction)

Criminal Appeal
Case No. 18/2149 CoA/CRMA

BETWEEN: PUBLIC PROSECUTOR

Appellant

AND: CONNIE SEWERE

Respondent

Coram: ***Hon Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver A. Saksak
Hon. Justice Dudley Aru
Hon. Justice Gustaf Andrée Wiltens

Counsel: *Mr Simcha Blessing for the Appellant*
Ms Pauline Kalwatman and Mr Lorenzo Moli for the Respondent

Date of Hearing: *5th November 2018*
Date of Decision: *16th November 2018*

JUDGMENT

Introduction

1. This is a State appeal brought by the Public Prosecutor pursuant to Section 201 of the Criminal Procedure Code Act [CAP 136].

2. Mrs Connie Sewere, was charged with one count of misappropriation of the sum of VT6,527,775 from her former employer Shane Royle, director of Rapid Electrical Company and owner of Bayview Apartments. She pleaded guilty to the charge on 5th June 2018. She was convicted and sentenced to 2 years imprisonment wholly suspended for 3 years. In addition, she was ordered to

pay VT3,000,000 in compensation to her employer in fortnightly instalments of VT30,000.

The appeal and cross-appeal

3. The State appeals against the suspension of sentence. Mrs Sewere filed a cross-appeal against the compensation order, seeking a reduction.

Late appeal

4. The Public Prosecutor was late in the filing of the appeal. They sought leave by a separate application. At the hearing Ms Kalwatman did not take any issue. Leave was granted to the Public Prosecutor for the main appeal and to the respondent for the cross-appeal.

Issues At Sentencing

5. In sentencing the respondent, the primary judge considered the issues of the amount misappropriated, the breach of trust involved and the lengthy period of offending. The judge concluded that a starting sentence of 4 years imprisonment was wholly appropriate. Subsequently the judge considered the mitigating factors together with matters personal to the respondent and reduced the starting sentence by 12 months down to 36 months. Finally the judge reduced the sentence by a further 12 months for the respondent's guilty plea, leaving the end sentence to be 24 months. (2 years).

6. The judge then considered the issue of suspension of sentence and suspended the end sentence of 24 months for a period of 3 years. The judge imposed a condition that the respondent should not re-offend within the period of 3 years.

7. Finally the judge imposed a sentence of a compensation by ordering the respondent to pay VT3 million commencing on 10 August 2018 in fortnightly instalments of VT30,000.

Issues on Appeal

8. On the substantive appeal there is one main issue: Did the sentencing judge err in imposing a suspended sentence by taking into account irrelevant matters, placing undue weight on the respondent's good character; and considering delay as a factor justifying suspension?

9. On the cross-appeal the issue is: Did the sentencing judge err in imposing the amount of VT30,000 and not VT20,000 as proposed by the respondent?

The Facts

10. Since 2006 Mrs Sewere worked with Rapid Electrical Company as Administrative Assistant. The director of the company Mr Shane Royle also owns Bayview Apartments, a rental property. Tenants paid rentals for renting the apartments. The moneys paid were normally deposited into Bayview Apartments' bank account by Mrs Sewere. In 2011 Mr Royle discovered discrepancies in the incomes of his business. He ordered his accountant to do an internal audit of his business financial transactions. The audit report revealed that Mrs Sewere was responsible for collecting and banking the rent.

11. The receipts and deposit reconciliation spreadsheets showed that from 2007 through 2011 Mrs Sewere took separate amounts totalling the sum of VT6,527,115. Mrs Sewere used VT5,993,465 for her own purposes. The balance was recovered.

The Sentence Appealed

12. The judge imposed an end sentence of 2 years and ordered its suspension for a period of 3 years. The judge considered Mrs Sewere's unblemished character, her gambling addiction, a loose accounting system without regular checks, the inordinate delay in finalising her case, her willingness to repay the balance owing and her ability to make good on her offer. For these factors, the judge said he took the exceptional course and ordered a suspended sentence.

13. In addition, the judge imposed a compensation sentence ordering Mrs Sewere to repay the sum of VT3 million in the sum of VT30,000 per fortnight commencing from 10 August 2018.

Submissions

14. The prosecution argued the judge had imposed a sentence that was manifestly inadequate. They argued that the respondent's offending to feed her gambling addiction and a loose accounting system without regular checks were not mitigating factors and did not justify the judge accepting suspension of sentence under section 57 (1) of the Penal Code Act. Further the prosecution, whilst accepting that previous good character is a factor to be considered under section 57 of the Act, submitted that it carried little weight in this case. They argued as well that the offending involved a prolonged course of criminal activity and there was therefore a strong need for deterrence.

15. On the cross-appeal Ms Kalwatman submitted that Mrs Sewere's circumstances have changed warranting a reduction of VT30,000 to VT20,000 to accord with her accepted offer of VT20,000 per month for payment of the reparation.

Discussion

16. The power of a judge to suspend a sentence of imprisonment is a discretionary one to be exercised upon considering the circumstances of the case, the nature of the crime and the character of the offender.

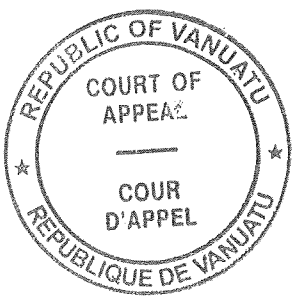
17. Section 57 (1) relevantly states –

"(a) If the Court has convicted a person of an offence considers that:

(i) in view of the circumstances; and

(ii) in particular, the nature of the crime; and

(iii) the character of the offender,



it is not appropriate to make him or her suffer an immediate imprisonment, it may in its discretion order the suspension of the execution of imprisonment sentence it has imposed upon him or her, on the condition that the person sentence commits no further offence against any Act, Regulation, Rule or Order within a period fixed by the Court, which must not exceed 3 years; ...."

18. The judge dealt with suspension in paragraph 17 of the sentence where he states:

"I turn next to consider whether this is such an exceptional case as to warrant the suspension of the whole or part of the end sentence. In this regard I have considered the witness neither to unblemished character of the defendant, the fact that the crime was committed to feed the defendant's gambling addiction and occurred within a loose accounting system without regular checks. Finally in view of the inordinately lengthy delay in finalising this case through no fault of the defendant and, given the defendant's willingness to repay the balance amount owing to her former employer and her current ability to make good on that offer, I shall take the exceptional course and order the defendant's end sentence of 2 years imprisonment to be wholly suspended for a period of 3 years".

19. Mrs Sewere said that part of the reason for her offending was a gambling addiction. There was no other evidence to support that claim however in the circumstance the Judge was entitled to accept Mrs Sewere had an addiction. Such an addiction reduced her culpability and was a factor for the Judge to take into account in supporting suspension.

20. As to the Judge's remarks about a loose accounting system we agree with the prosecution that this was not a factor relevant to support suspension. This was a failure by Mrs Sewere's employers not a matter which reduced the seriousness of her offending.

21. For good character and delay the prosecution had agreed in their submissions to the primary judge that Mrs Sewere had an unblemished period and that there was delay in prosecuting her case. We consider the judge had correctly considered those factors in imposing a suspended sentence.

22. The Prosecution relied on Public Prosecutor v. Morkro [2017] VUCA 16 and RL v. Public Prosecutor [2018] VUCA 26. In Morkro this Court said a delay of 4 years would not be an exceptional circumstance for suspension considering the serious nature of the offence.

23. Those cases are different in nature. The two cases referred to involved very serious sexual offending. Mrs Sewere's case involved one charge of misappropriation. The penalties are different. The delay was a factor, but only one factor to be assessed against the seriousness of the offending. After discounting the loose accounting system as relevant to suspension we are not convinced the Judge was wrong to order suspension. While the offending had some serious aspects Mrs Sewere had strong personal mitigation and had made positive attempts to repay the money taken.

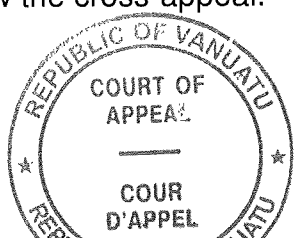
24. On the cross-appeal Ms Kalwatman argued that because Mrs Sewere is currently suspended on half her salary that she is unable to pay VT30,000 as ordered by the primary judge. Her fortnightly salary is VT25,000. She has no other source of income.

25. Except for the death of her grand-mother, Mrs Sewere's change of circumstances were submitted to the judge in submissions. Also available to the judge was Mrs Sewere's offer of VT20,000 per month which was accepted by the complainant.

26. Section 40 (5) of the Penal Code Act states –

"When determining the amount of type of compensation to be made, the Court must take into account:
(a) the offender's sources of income; or
(b) any offer, agreement, response, measure, or actions made or taken between the offender and the victim."

27. We are satisfied the sentencing judge did not take into consideration the matters required by Section 40 (5) of the Act adequately or at all. For those reasons we accept Ms Kalwatman's submissions and allow the cross-appeal.



The Result

28. The appeal by the State is dismissed.

29. The cross-appeal is allowed.

30. The Sentence dated 27 July 2018 is varied in paragraph 18 by replacing VT30,000 with VT20,000 and in the Order dated 27 July 2018 by replacing VT30,000 with VT10,000 in the second last paragraph.

DATED at Port Vila this 16th day of November, 2018.

BY THE COURT

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Vincent Lunabek
Chief Justice

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU